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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LIANNA DREYFUS,

Defendant and Appellant.

D072420

(Super. Ct. No. SCN355947)

APPEAL from a judgment of the Superior Court of San Diego County, Hon.

Carlos O. Armour, Judge. Affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

On October 3, 2016, defendant Lianna Dreyfus pleaded guilty to making a false or fraudulent insurance claim (Pen. Code,<sup>1</sup> § 550, subd. (b)(2)). On November 1, 2016, imposition of sentence was suspended and Dreyfus was granted formal probation for three years. On June 14, 2017, Dreyfus admitted she failed to report to probation. The court in response revoked and reinstated probation on the same terms and conditions, while adding an alcohol testing condition. Dreyfus failed to object to any of the conditions when the court imposed them.

On appeal, Dreyfus objects to condition 6(l), requiring her to obtain probation's consent before leaving San Diego County; condition 10(g), requiring her to obtain probation's approval as to her residence; and condition 6(n), requiring her to "[s]ubmit person, vehicle, residence, property, personal effects, *computers, and recordable media . . .* to search at any time with or without a warrant, and with or without reasonable cause, when required by [her probation officer] or law enforcement officer." (Italics added.) Dreyfus specifically challenges the italicized portion of condition 6(n) relating to computers and recordable media.

Dreyfus contends conditions 6(l) and 10(g) are unconstitutionally vague and overbroad because they violate her constitutional rights to travel and freedom of association. Dreyfus likewise contends condition 6(n) is unconstitutional because it unfairly restricts her Fourth Amendment right to privacy. As we explain, we disagree with defendant's contentions and affirm her judgment of conviction.

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<sup>1</sup> All further statutory references are to the Penal Code.

## I.

### FACTUAL OVERVIEW<sup>2</sup>

Because this appeal does not challenge either the sufficiency or admissibility of the evidence supporting her conviction, we only briefly review the facts.

On November 26, 2014, Dreyfus made what turned out to be a fraudulent insurance claim to an insurance company. Dreyfus crashed her vehicle into another vehicle when she "nodded off" while driving and then later claimed that someone ran into her vehicle while it was parked. She had a prior conviction for using false information on a DMV document.

When the court in November 2016 initially granted Dreyfus formal probation, it included various terms and conditions that she did *not* challenge, including that she obtain consent before leaving San Diego County, obtain approval as to her residence, and submit to electronic search conditions.

Within six months of her probation, a Carlsbad police officer observed Dreyfus pursuing a male as she yelled at him. The officer told Dreyfus to stop. She approached the officer and started swinging her hands and hitting the officer's arms. Dreyfus was arrested for battery on a peace officer (§ 243, subd. (b)). After her release, Dreyfus failed to report to her probation officer within 72 hours, as required by condition 6(i).

A few days later, a Carlsbad police officer responded to a call of Dreyfus chasing a male with a knife. Once on scene, officers detained Dreyfus and found a knife located

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<sup>2</sup> Because defendant pleaded guilty, this summary is principally derived from the probation report.

on a blanket Dreyfus had been sitting on. Dreyfus alleged the male was chasing her and would not leave her alone. A witness told officers the male choked Dreyfus as she was lying on the blanket and Dreyfus in response grabbed the male's knife and chased after him. Dreyfus was arrested for assault with a deadly weapon not a firearm (§ 245, subd. (a)).

Moreover, the record shows on three occasions Dreyfus failed to appear for her mandatory compliance appointments. Dreyfus also failed to abstain from the use or possession of a controlled substance, as required by condition 9(c). While on probation, Dreyfus tested positive for hydrocodone, hydromorphone, morphine, amphetamine, and methamphetamine. Although an alcohol condition was not initially imposed as a condition of her probation, the record shows she tested positive for alcohol on four occasions.

Additionally, Dreyfus failed to enroll in and complete a residential substance abuse treatment program, as required by condition 9(a). Dreyfus also violated condition 6(l) when she left San Diego County without permission and later reported that she allegedly fell asleep in a friend's car and awoke in Idaho. Further, Dreyfus has only made one payment to revenue and recovery as required by condition 2(w). Dreyfus is unemployed, homeless, and abuses drugs.

## II.

### DISCUSSION

As noted, the record shows Dreyfus did not object to any probation conditions when imposed by the court. Dreyfus, however contends her claims do not rest upon any facts that are in dispute or were not developed during the trial.

As such, any attack Dreyfus may make to the imposition of these, or any other, conditions is limited to a facial challenge, as failure to object forfeits any as-applied challenge. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887–889 (*Sheena K.*) [noting a defendant may assert a constitutional challenge to a probation condition to the extent that it presents "a pure question of law, easily remediable on appeal by modification of the condition," and that "is capable of correction without reference to the particular sentencing record developed in the trial court"].)

#### *A. Guiding Principles*

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) Probation is a privilege, not a right. A court has broad discretion to impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (§ 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the

probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' ' ' (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).)

Failure to raise the constitutionality of probation conditions does not forfeit the issue for review on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888–889; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1127.) Importantly, to avoid any vagueness, these conditions must provide an opportunity for " 'the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated.' " (*Sheena K.*, at p. 890.)

The facial constitutionality of a probation condition is subject to de novo review. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) Although this court is reviewing a question of law rather than fact, this court's analysis may take into account undisputed facts from the record. (See *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323 [noting "appellate courts have discretion to address constitutional issues raised on appeal . . . particularly when the issue presented is a 'pure question of law' turning on undisputed facts or when " 'important issues of public policy are at issue" ' "].)

#### B. *Approval Conditions*

Dreyfus contends the court's imposition of condition 6(l), requiring her to obtain probation's consent before leaving San Diego County, and condition 10(g), requiring her to obtain probation's approval as to residence, violate her First Amendment right to travel and freedom of association because they are unconstitutionally vague and overbroad. We disagree.

The environment in which a probationer serves probation is an important factor as to whether the probation will be successfully completed, and thus, directly impacts the likelihood of effective rehabilitation. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.) Although conditions requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944), courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality. (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1228.)

Dreyfus contends the residence condition is so broadly worded that it would allow the probation officer unfettered discretion to bar Dreyfus from her current home or other living arrangements that would not hinder her rehabilitation. We conclude the residence conditions are plainly worded and adequately detailed to inform Dreyfus what is expected of her and do not allow the probation officer unfettered discretion. (Compare *Sheena K.*, *supra*, 40 Cal.4th at p. 880 [noting that in failing to specify that defendant know which persons were disapproved of by her probation officer, the probation condition was unconstitutionally vague or overbroad].) Dreyfus merely needs to obtain approval and there is nothing to suggest that it will be arbitrarily withheld.

Moreover, we further conclude the approval conditions are necessary because they serve a legitimate purpose: namely, to help Dreyfus rehabilitate and to deter future criminality via supervision. (See *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 [noting the "essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's

constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement"].)

Indeed, the undisputed facts show that within about six months of being placed on probation, Dreyfus remained homeless. She was arrested twice for assaultive behavior. She failed to report for mandatory probation appointments on numerous occasions. She tested positive for controlled substances and on four occasions tested positive for alcohol. She also left San Diego County and went to Idaho without her probation officer's permission, based on the excuse she had "fallen asleep." She only made one restitution payment and failed to enroll in a residential substance abuse treatment program.

The approval conditions are thus entirely appropriate because, given Dreyfus's escalation of violent behavior, her transient lifestyle, her polysubstance drug problem, and her poor probation performance, the environment in which Dreyfus spends her time will be an important factor in her rehabilitation. (See *O'Neil, supra*, 165 Cal.App.4th at p. 1355.) The approval conditions will allow the probation officer to ensure Dreyfus lives in a residence where drugs or alcohol are unavailable. Additionally, Dreyfus's recent violent behavior while on probation appears to be impacted by her living situation: on two occasions she was arrested for violent behavior at the same location, in a Carlsbad park where she "resides." We thus conclude that these conditions are narrowly tailored to fulfil the state's interest in ensuring Dreyfus's compliance with probation and deterring future criminality. (See *Sheena K., supra*, 40 Cal.4th at p. 890.)



### *C. Electronic Search Condition*

Defendant next contends the court's imposition of condition 6(n), specifically the search of electronic media, is unconstitutionally overbroad because it violates her Fourth Amendment right to privacy. As noted above, Dreyfus's challenge to this condition is limited to a facial attack.

Whether electronic search conditions can be imposed as conditions of probation is before our Supreme Court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (review granted Feb. 17, 2016, S230923). Pending further direction from our high court, we must undertake to resolve this case as best we can.

Where some aspects of a defendant's crime involve the use of electronic devices, an electronic search condition may be appropriate to prevent the person from returning to the same criminal activity and provide the necessary monitoring of the probationer's activity. (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175–1176.) " 'The purpose of an unexpected, unprovoked search of defendant is to ascertain whether [the probationer] is complying with the terms of [probation]; to determine not only whether he [or she] disobeys the law, but also whether he [or she] obeys the law.' " (*People v. Reyes* (1998) 19 Cal.4th 743, 752.)

At the outset, we conclude there is nothing vague about the condition. It plainly directs Dreyfus to submit to electronic searches of any computer and recordable media devices. Dreyfus, however, contends this condition would give her probation officer unfettered access to data inside her computer or her electronic device. But, as the court

observed in *People v. Olguin* (2008) 45 Cal.4th 375, 383 (*Olguin*), the probation department's authority to supervise compliance with the conditions of probation does not empower the department to engage in irrational conduct or make irrational demands.

We conclude Dreyfus has not established the electronic search condition is unconstitutionally overbroad. Dreyfus does not identify any specific privacy interests that would be infringed or any harm stemming from imposition of an electronic search condition. (See *In re J.E.* (2016) 1 Cal.App.5th 795, 806 ["Nothing in the record shows Minor even has a cell phone or any electronic devices, and Minor does not point us to anything in the record showing any actual harms stemming from their inspection."].)

We recognize the limited use of "recordable media" in connection with Dreyfus's conviction for making a false or fraudulent insurance claim. However, we conclude this is a factor, but not the *only* factor, in determining that this condition is narrowly tailored to help rehabilitate Dreyfus while also protecting the public. (See *O'Neil, supra*, 165 Cal.App.4th at p. 1355.) Although not every condition that may aid in supervision of an adult probationer necessarily will be reasonable, *Olguin* does not require that the supervision method *must* relate to the defendant's past criminal conduct.

As summarized *ante*, the undisputed facts in the record show that Dreyfus has performed extremely poorly while on probation; that she has repeatedly violated myriad terms of her probation; and that her behavior while on probation shows she is becoming more, as opposed to less, violent, as evidenced by her two arrests for assaultive conduct. Given this record including her transient lifestyle and ongoing drug abuse, we conclude the electronic search condition is an important tool that probation may use to ensure

Dreyfus complies with the terms of her probation. (See *In re P.O.* (2016) 246 Cal.App.4th 288, 295 [electronic search condition is reasonably related to future criminality because it enables peace officers to review electronic activity for drugs or probation violations].)

As the court in *Olguin* observed, "probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions." (*Olguin, supra*, 45 Cal.4th at p. 384.) Based on this record, we conclude that the state's interest in public safety outweighs the slight invasion of Dreyfus's privacy that results from law enforcement having access to Dreyfus's electronic devices.

#### DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

GUERRERO, J.